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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

LARRY OSA OGBOMON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONER'S RESPONSE TO SUGGESTION OF MOOTNESS

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Rule 21, Rules of Supreme Court 1

Pursuant to Rule 21 of the Rules of this Court, petitioner opposes the United States' Suggestion of Mootness.

I. The Petitioner Did Not Receive a Full and Fair Immigration Hearing.

The Solicitor General, contends that Mr. Ogbomon did not challenge the deportation findings by the administrative judge.[1] Suggestion of Mootness ("Suggestion") p. 7 n.4. In preparation for this response, we discovered that Mr. Ogbomon moved to reopen the findings of the court, but his motion was denied. Not only was he **not present and unrepresented** at the hearing, his former counsel submitted an affidavit detailing that he had mailed the notice to the petitioner at the wrong address, and when the notice was returned, he followed his regular procedure of keeping the notice on file in his office. **See** Declaration of R. Travis Douglas. So while it is true that his request for rehearing was denied, he made an affirmative effort to fight that determination. The fact that he was not present and unrepresented certainly shows that he did not receive the procedural guarantees under the INA. Thus, he received neither a notice nor a meaningful opportunity to be heard on the issue of his

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[1] Petitioner failed to include the facts surrounding the question of mootness in his Petition for Writ of Certiorari. The petitioner did not learn of the supervised release revocation until after the petition was filed. While Mr. Spencer represented Mr. Ogbomon below, and co-authored the pleadings before this Court with Ms. Hashimi, Mr. Ogbomon was represented by separate counsel in both the Alabama and supervised release revocation cases. Counsel regrets this unintentional omission.

deportation at his sentencing hearing, the procedure that the Eleventh Circuit has found sufficient.[2]

II. The Question of Whether §3583(d) Permits Judicial Orders of Deportation is Intrinsically Intertwined with the Issue of Mootness.

In this case the question of mootness is intrinsically intertwined with the merits. The issue of whether the revocation of supervised release nullifies the effect of a judicial order of deportation cannot be answered without first determining what, if any, effect such an order would have. As the Solicitor General acknowledged in its brief on the merits, "it is unclear whether the district court contemplated that petitioner would be deported under the original sentence . . . now that petitioner's supervised release has been revoked." U.S. Br. 6. The respondent erroneously relies on *United States v. Tatum*, 998 F.2d 893, 895 (11th Cir. 1993) (per curiam), for the proposition that the case is moot. Suggestion p. 3. But *Tatum* held *only* that after a revocation of supervised release the district court could not impose an additional term of supervised release.[3] *Tatum*, 998 F.2d at 895. There clearly was no discussion of whether a judicial order of deportation would survive the revocation of supervised release.

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[2] See *United States v. Oboh*, 92 F.3d 1082, 1087 (11th Cir. 1996), asserting that while the procedural protections at a sentencing hearing and an administrative hearing are not equal, it was up to Congress to make the necessary changes.

[3] The statute has since been amended by Congress. 18 U.S.C. §3583(h).

At the time Mr. Ogbomon was sentenced, the district court ordered that he receive a term of supervised release in addition to his custodial sentence. In this regard, the order of deportation constituted a "punishment." It seems unlikely that a district court would intend for an alien to avoid this penalty by engaging in conduct that would result in a revocation of his supervised release. Thus, the petitioner submits this is an issue that particularly warrants review, since the question of mootness turns on the question presented by the merits. *See Honig v. Doe*, 484 U.S. 305, 329 (1988) (Rehnquist, C.J. concurring) (suggesting that once a case is before the Supreme Court, the unique nature of the Supreme Court, being "the last word on every important issue under the Constitution and statutes of the United States," may warrant an abandonment of the doctrine of mootness.)

III. The Interpretation of the Recently Enacted IIRAIRA Does Not Militate in Favor of Mootness.

In the Solicitor General's Suggestion of Mootness he suggests that §304(a)(3) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRAIRA")[4] has the effect of overruling the court of appeals decision in this case. Sugg. of Mootness, p. 10. While this is consistent with the petitioner and the government's position in this matter, it is not clear that §304(a)(3) of IIRAIRA *necessarily* overrules the Eleventh Circuit's interpretation of 18 U.S.C. §3583(d).

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[4] All Code citations refer to Title 8 prior to the enactment of IIRAIRA.

As a matter of statutory construction, Congress is assumed to be aware of existing law when it passes legislation. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185 (1988); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990). The Eleventh Circuit's decision in *United States v. Chukwura*, 5 F.3d 1420 (1993), was the first court of appeals ruling to interpret 18 U.S.C. §3583(d) to allow a judicial order of deportation. This statute existed several years prior to the 1996 enactment of IIRAIRA. Since IIRAIRA makes no mention of 18 U.S.C. §3583(d), or any effect the statute could have on supervised release or the criminal statutes, IIRAIRA cannot be said to necessarily overrule the court of appeals.

Moreover, repeal by implication is disfavored, *Crawford Fitting Company v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987), and will not be found unless the intent to repeal is clear and unambiguous. *Rodriguez v. United States*, 480 U.S. 522, 524 (1987) (per curiam). Unless there is some affirmative showing of an intention to repeal, the only permissible justification for repeal by implication is when the earlier and later statutes are irreconcilable. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 189 (1978). While the language of the IIRAIRA may seem plain, the difference in future parties' interpretations may bring about the same dispute here – what the language of the statute means. Because Congress did not specifically mention 18 U.S.C. §3583(d) with §304(a) of IIRAIRA, it is premature, respectfully, to find that the subsequent legislation favors mootness.

The most compelling reason to determine this matter on the merits is because of the pendency of cases that will be decided prior to the effective date of IIRAIRA. There

are two cases already pending before the Court, *Oboh v. United States*, No. 96-6653, and *Bowen v. United States*, No. 96-6658. As the Eleventh Circuit is the only circuit that has taken this course of action, there is no reason to believe that the district courts would cease this practice without a ruling from this Court. The fact that alien defendants in one lone circuit are treated so disparately from those in the other circuits creates an intolerable constitutional difference.

IV. There Are Collateral Consequences to Mr. Ogbomon Which Militate Against Mootness.

A criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction. *Sibron v. New York*, 392 U.S. 40, 57 (1968). The doctrine of mootness will not apply where civil disabilities flow from the conviction, *Carafas v. LaValle*, 391 U.S. 234 (1968), and will not lie where it is possible that the challenged conviction may result in an enhanced criminal history, *Minnesota v. Dickerson*, 508 U.S. 366, 371 n.2 (1993), or where the conviction may be used to impeach future testimony. *Evitts v. Lucey*, 469 U.S. 387, 391 n.4 (1985). There are significant civil and criminal consequences to the district court's order below.

a. Whether this judicial order of deportation is valid maintains seminal import in petitioner's challenge to the finding of deportability made by the administrative judge. Mr. Ogbomon's INS file contained his judgment and commitment order entered on August 30, 1991 which contained this judicial order of deportation.

First, there is no indication that this order was not considered at the time the initial determination was made and at the time he sought to have the record reopened. Petitioner's position is supported by the fact that it is the current practice, in the Eleventh Circuit, for administrative judges to give great deference to these judicial orders of deportation.[5] Thus, it is clear that a finding in petitioner's favor, on the merits, would aid petitioner's continuing challenge to this INS finding of deportability.

Second, this administrative finding of deportability was made based on petitioner's conviction for reentering the country after deportation. However, the deportation in that case was also a judicial order of deportation made under §3583(d). Thus, if petitioner were to prevail on the merits here, the very basis for the administrative finding of deportability and his criminal conviction would be undermined. *See U.S. v. Chukwura*, 101 F.3d 230 (2nd Cir. 1996)

The United States Sentencing Guidelines ("U.S.S.G.") apply to immigration offenses. U.S.S.G. Part. L. U.S.S.G. §2L1.2 specifically applies to the crime of unlawfully entering or remaining in the United States, and the commentary, at note 2, provides that "in the case of a defendant with repeated prior instances of deportation without criminal conviction, an upward departure may be warranted." U.S.S.G. §2L1.2, Comment (n.2). The district

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[5] *See In The Matter of Nigel Roger Caines*, Deportation Proceeding of 11/25/96, File A 42-081-339 (attached as appendix A), where the Immigration Judge held that an order of deportation under §3583(d) was binding on immigration judges and thus divested him of jurisdiction to set bond.

court's deportation order at issue could well subject him to an upward departure in the future. *See Minnesota v. Dickerson, supra.*

b. This Court has refused to extend the doctrine of mootness where an alien would suffer adverse consequences from a conviction where he had already served his sentence. *See Fiswick v. United States*, 329 U.S. 211 (1946).

In *Fiswick* it was noted that an alien sentenced to imprisonment of one year or more because of a conviction of any crime of moral turpitude is subject to deportation if the crime was committed within five years of the alien's entry into the United States. *Id.*, at 221. Because the judgment provided "unimpeachable evidence" that Fiswick had committed the crime charged, he would be denied his best defense, that he was not properly convicted, in defending his deportation order, leaving him only to argue that the crime was not one of "moral turpitude." *Fiswick*, 329 U.S. at 221-222.

The Court also noted that other disabilities could flow from an improperly obtained judgment against Fiswick, an alien. The conviction would burden an attempt at naturalization, since he would have to establish that during the five years preceding his petition for naturalization he "ha[d] been and still is a person of good moral character." 54 Stat. 1137, 1142, 8 U.S.C. §707(a)(3). Such a conviction would impair his ability to meet that standard. *Fiswick*, 329 U.S. at 222. And even if he was successful in his naturalization attempt, he would be burdened with a felony conviction which could result in the loss of civil rights. *Id.* (footnote omitted). "Thus,

Fiswick ha[d] a substantial stake in the judgment of conviction which survive[d] the satisfaction of sentence imposed on him." *Fiswick*, 329 U.S. at 229. *See also Pollard v. United States*, 352 U.S. 354, 358 (1951) (recognizing that petitioner's claim was not moot because of the collateral consequences, even though he was appealing the sentence, not the conviction). Because deportation may result in the loss "of all that makes life worth living," *Fiswick*, 329 U.S. at 222, note 8 (citations omitted), Mr. Ogbomon should be heard on this matter.

c. Further, there are a number of provisions under the Immigration and Naturalization Act ("INA") that would be implicated by the district court's order of deportation. An alien who has previously been deported is ineligible to receive a visa and is excludable. 8 U.S.C. §1182(a)(6)(A). Title 8 U.S.C. §1101(f) provides that, under specific circumstances, a person cannot be regarded as having "good moral character." *Id.* The statute also excepts persons who have been imprisoned for more than 180 days from being of "good moral character." §1101(f). Even beyond these particular exclusions, the statute provides that "the fact that any person is not within the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character." *Id.* Any deportation makes it more difficult for an alien to legally reenter, so subsequent deportation orders adversely affect the petitioner.

Furthermore, under some circumstances the Attorney General has the discretion to allow an alien to voluntarily depart from the United States in lieu of deportation, if the alien can establish that he was a person of good moral character at least five years prior to the application for

voluntary departure. 8 U.S.C. §1254(e). A decision by the Immigration and Naturalization Service to permit voluntary departure in lieu of deportation is highly discretionary. *See Molina v. INS*, 981 F.2d 14 (1st Cir. 1992). The decision to grant an alien permission to reapply after deportation within the last five years is with the Attorney General. *United States v. Forty-Five Thousand Nine Hundred Forty Dollars ($45,940) in U. S. Currency*, 739 F.2d 791 (2nd Cir. 1984). Moreover, if the Attorney General decides that relief should be denied as a matter of discretion, he need not consider whether the statutory eligibility requirements are met. *INS v. Rios-Pineda*, 471 U.S. 444 (1985). Since deportation affects the decision to reapply, it is clear that the petitioner has a "substantial stake in the judgment of conviction that survives the satisfaction of the sentence imposed on him. *Carafas*, 391 U.S. at 237, quoting *Fiswick v. United States*, 329 U.S. 211 (1946). The significant burdens placed on the petitioner by the INA make a mootness finding inappropriate.[6] *See also* 8 U.S.C. §1101(f) (defining when a person is of "good moral character" for the purposes of the INA.

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[6] While this Court found that mootness dictated dismissal in *Lane v. Williams*, 455 U.S. 624 (1982), where the petitioner had served the entire sentence of his parole term, mootness was predicated on the fact that there could be "no further detention or restraint as a result of the mandatory parole term." 455 U.S. at 629, note 8. Because of the severe consequences of the INA, *Lane* is not applicable.

CONCLUSION

The petitioner requests that the Court determined the case on the merits and reverse the judgment of the court of appeals.

Respectfully submitted,

Suzanne Hashimi
R. Gary Spencer
Stephanie Kearns

U.S. Department of Justice
Executive Office for Immigration Review
Office of the Immigration Judge

File A 42-081-339

In the Matter of Nigel Roger Caines, Respondent.	)	In Deportation Proceedings **Order of the Immigration Judge**

Respondent is being held by the INS pursuant to an order entered by the U.S. District Court (N.D. GA). This Court is without jurisdiction to set bond in such a case.

Accordingly, Respondent's request for bond is hereby DENIED for want of jurisdiction.

Date: 11-25-96 /s/ Illegible
Place: Atlanta GA (*Immigration Judge*)